

GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

WES HAZEN, et al.,

Petitioners,

v.

YAKIMA COUNTY,

Respondent,

And,

FRIENDS OF THE WENAS; COLUMBIA
READY-MIX; YAKIMA COUNTY FARM
BUREAU, INC., YAKIMA COUNTY
CATTLEMEN'S ASSOCIATION, CENTRAL
PRE-MIX CONCRETE COMPANY,

Intervenors.

Case No. 08-1-0008c

PARTIAL COMPLIANCE ORDER

**Issue 10: LAMIRD – Buena Rural
Settlement**

I. SYNOPSIS

At the continued telephonic Compliance Hearing,¹ the Board bifurcated Issue 10 (LAMIRD – Buena) (Case No. 08-1-0008c) from the proceedings to allow for supplemental evidence in relationship to the designation of the Buena area as a Type I LAMIRD.² In the original case, the basis of non-compliance was that in labeling areas as LAMIRDs based on the fact they were pre-designated “Rural Settlements,” the County had not performed an analysis as to whether these areas satisfy the GMA’s criteria for LAMIRDs.³ Upon review of the original documents and Yakima County’s supplemental materials and Futurewise’s response, the

¹ April 19, 2011.

² Partial Coordinated Compliance Order issued April 27, 2011.

³ RCW 36.70A.070(5)(d)(i)(iv)(v).

1 Board finds **compliance** with the adoption of Ordinance 2-2011, the County's designation of
2 the Buena Type I LAMIRD is based predominately on the built environment; and the Buena
3 Rural Settlement [community], and water/sewer service was in existence prior to July 1,
4 1990.

5 **II. BACKGROUND AND PROCEDURAL HISTORY**

6 On April 5, 2010, the Board issued its Final Decision and Order (FDO) in the matter of *Wes*
7 *Hazen, et al v. Yakima County*, Case No. 08-1-0008c.⁴ With this FDO, the Board
8 determined, among other things, Yakima County had failed to comply with the Growth
9 Management Act, RCW 36.70A (GMA), in relationship to Issue 10, Limited Areas of More
10 Intensive Rural Development. The Board remanded the challenged ordinances to the
11 County to take legislative action to achieve compliance by October 4, 2010, which was later
12 extended to February 1, 2011.⁵

13 On February 11, 2011, the Board received Yakima County's Status of Compliance with FDO
14 and its Index of Compliance setting forth actions it has taken in regards to both matters.

15 On February 25, 2011, the Board received Futurewise's Objections to a Finding of
16 Compliance.

17 On March 7, 2011, the Board received Yakima County's Response to Futurewise's
18 Objections.

19 On March 15, 2011, the Board held a telephonic compliance hearing for these coordinated
20 matters. Board members Joyce Mulliken, Raymond Paoella, and Nina Carter attended;
21 Board member Mulliken presiding. Jill Smith appeared on behalf of Futurewise,
22 representing the interests of Wes Hazen, Upper Wenas Preservation Association, and itself.
23 Paul McIlrath appeared on behalf of Yakima County and Sam Rodabough appeared on

24 ⁴ The only petitioners remaining in Case 08-1-0008c were the Yakima Nation and Wes Hazen, Upper Wenas
25 Preservation Association, and Futurewise (collectively Futurewise).

26 ⁵ August 17, 2010 Order Granting Motion to Extend.

1 behalf of Intervenor Yakima Farm Bureau. Although the Yakama Nation was a prevailing
2 party to Case 08-1-0008c, it did not participate in these compliance proceedings nor did any
3 other intervening party.

4 At the March 15th Compliance Hearing, Yakima County conceded it had not adopted
5 legislation by the established compliance deadlines⁶ but had recently adopted Ordinance 2-
6 2011 (adopted March 15) in relationship to its Rural Lands. Since the petitioners did not
7 have an opportunity to review the enacted legislation, the Board continued the matter,
8 requested the County electronically file signed, executed copies of the ordinances, and
9 allowed the parties to file supplemental briefing.⁷ The County promptly filed a copy of the
10 ordinance and supplemental briefing was received from Futurewise and Yakima Farm
Bureau on March 29, 2011, with a response filed by Yakima County on April 5, 2011.⁸

11 On April 19, 2011, the Board held a telephonic Continued Compliance Hearing. The same
12 individuals attending the March 15th compliance hearing were present for this continued
13 hearing. At this hearing, it was determined by the Board that supplemental evidence was
14 needed as to Yakima County's action taken in relationship to the designation of the Buena
15 area as a Type I LAMIRD and its 1990 "built environment." Therefore, the Board bifurcated
16 the LAMIRD claim – Issue 10 - and allowed for both supplemental evidence and briefing.⁹

17 Yakima County filed its supplemental materials to compliance report on April 26, 2011.
18 Petitioners filed responsive briefing on April 29, 2011. Intervenor's did not participate in this
19 aspect of the case.

21 ⁶ February 1, 2011 for Case 08-1-0008c and February 2, 2011 for Case 09-1-0014.

22 ⁷ March 16, 2011 Board letter to the parties.

23 ⁸ Wes Hazen, Upper Wenas Preservation Association, and Futurewise's Objections to a Finding of
24 Compliance, filed March 29, 2011 (Futurewise's Supp. Objections); Yakima County Farm Bureau's
25 Supplemental Brief RE: Finding of Compliance, filed March 29, 2011 (Farm Bureau Supp. Brief); Yakima
County's Follow-up Response to Futurewise's Second Brief Objecting to a Finding of Compliance, filed April 5,
2011 (County's Supp. Response).

26 ⁹ For resolution of the other issues in this matter, see Coordinated Partial Compliance Order, EWGMHB Case
Nos 08-1-0008c and 09-1-0014, issued April 27, 2011.

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III. STANDARD OF REVIEW

In compliance proceedings that do not involve a determination of invalidity, the presumption of validity continues to apply and the burden remains on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of this chapter.¹⁰ In reviewing Yakima County's planning decisions during these compliance proceedings, the Board is instructed to recognize the "broad range of discretion that may be exercised" and to "grant deference to counties" in how they plan for growth.¹¹ However, Yakima County's actions are not boundless; those actions must be consistent with the goals and requirements of the GMA.¹²

IV. COMPLIANCE ISSUES

In response to the Board's April 2010 FDO, on March 15, 2011, the County adopted Ordinance 2-2011 which put in place amendments to the Comprehensive Plan 2015 and YCC Title 15 related to Rural Settlement Lands.

Issue 10: Limited Areas of More Intensive Rural Development

Did Yakima County violate the GMA – RCW 36.70A.020(1, 2, 8-10, and 12), .040, .070, .110, and .130 -- when adopting Ord. 15-2007, specifically the map designations and zoning, because it changed the County's "Rural Settlements" to limit densities to one dwelling unit per 2.5 acres outside of UGAs and LAMIRDs?

With the Final Decision and Order (FDO), the Board determined:¹³

It is evident from the County's own argument that no analysis has been conducted as to whether or not its Rural Settlements satisfy the GMA's criteria for LAMIRDs. Rather, this analysis is anticipated to be completed within two years. As this Board has previously stated, planning to come into compliance is not compliance.

...

¹⁰ RCW 36.70A.320(1), (2), and (3).

¹¹ RCW 36.70A.3201.

¹² *King County v. CPSGMHB*, 142 Wn.2d 543, 561 (2000); *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 435 Fn. 8 (2007).

¹³ April 5, 2010 FDO at 70.

1 The Board finds and concludes Wes Hazen/Futurewise has carried their
2 burden of proof in demonstrating that Yakima County, with the adoption of
3 Ordinance 15-2007's Mapping Criteria 5 for Rural Settlements has failed to
4 comply with RCW 36.70A.070(5)(d).

5 No appeal of this issue was sought. With the enactment of Ordinance 2-2011, the County
6 amended its Comprehensive Plan and Zoning Code to expressly reference Limited Areas of
7 More Intensive Rural Development (LAMIRDs), including providing for designation and
8 mapping criteria and zoning standards.

9 Futurewise contends the amendments contained within Ordinance 2-2011 "go a long way to
10 achieve compliance" but still fail in several regards.¹⁴ First, Futurewise asserts the Type I
11 LAMIRD criteria should be based predominately on the build environment, not on lots.¹⁵

12 Second, Futurewise argues the Rural Settlement (RS) Zoning District does not comply with
13 the requirements for Type I, Type II, and III LAMIRDs.¹⁶ Third, Futurewise contends the
14 Buena LAMIRD does not comply with the requirements of the GMA.¹⁷ Specifically,
15 Futurewise addresses the third issue of concern in the Supplemental Objection Brief.¹⁸

16 In response, Yakima County contends the GMA does not preclude the use of "parcels" to
17 delineate LAMIRD boundaries especially since the preservation of existing neighborhood
18 and community character is provided.¹⁹ In addition, the County notes its land use and
19 zoning is delineated along parcel lines and therefore use of this to establish boundaries is
20 appropriate.²⁰ Yakima County states it has no designated Type II or Type III LAMIRDs but
21 any proposed for the future would be required to conform to the County's policies and
22 regulations.²¹ As for the Buena LAMIRD, the County asserts that utility service has been

23 ¹⁴ Futurewise Objections, at 6

24 ¹⁵ Futurewise Objections, at 6

25 ¹⁶ FW Objections, at 6-8

26 ¹⁷ FW Objections, at 8 & 9

¹⁸ FW Supp Objections, at 2-6

¹⁹ County Supp. Response, at 4-5

²⁰ County Supp. Response, at 5

²¹ County Compliance Brief, at 6

1 extended to the area prior to the GMA, thus “built environment” for the purpose of LAMIRD
2 designation, and the area is unique in its relationship to the Zillah UGA.²²

3 The Board notes that Petitioner’s arguments relating to LAMIRD Type II and Type III
4 designation criteria within the Rural Settlement (RS) Zoning District in Yakima County Code
5 Chapter 15.37 fall outside of the scope of the issue statement for Issue 10 presented in the
6 PFR. Issue 10 was limited to changes in densities of one dwelling unit per 2.5 acres
7 **outside** of UGAs and LAMIRDs. Accordingly, the Board cannot consider those specific
8 arguments since to do so would be to issue an advisory opinion on issues not presented to
9 the Board in the Statement of Issues, contrary to RCW 36.70A.290(1). Petitioner must file a
new PFR to challenge new issues falling outside the scope of the original PFR.

10 Board Analysis and Discussion

11 RCW 36.70A.070(5) prescribes required provisions for a comprehensive plan rural element,
12 including lands not designated for urban growth, agriculture, forest, or mineral resources.
13 The rural element shall include measures that apply to rural development and protect the
14 rural character of the area, as established by the county, including *inter alia* measures
15 containing or otherwise controlling rural development and reducing the inappropriate
16 conversion of undeveloped land into sprawling, low-density development in the rural area.

17 RCW 36.70A.070(5)(d) authorizes Limited Areas of More Intensive Rural Development
18 (LAMIRDs), including “**necessary public facilities and public services**” and provides
19 statutory standards for three types of LAMIRDs. The standards for a Type I LAMIRD are set
20 forth in RCW 36.70A.070(5)(d)(i) as follows:

21 Rural development consisting of the infill, development, or redevelopment of
22 existing commercial, industrial, residential, or mixed-use areas, whether
characterized as shoreline development, villages, hamlets, rural activity centers,
or crossroads developments.

23 (A) A commercial, industrial, residential, shoreline, or mixed-use area shall be
24 subject to the requirements of (d)(iv) of this subsection, but shall not be subject to

25 ²² County Supp. Response, at 7

1 the requirements of (c)(ii) and (iii) of this subsection.

2 (B) Any development or redevelopment other than an industrial area or an
3 industrial use within a mixed-use area or an industrial area under this subsection
4 (5)(d)(i) must be principally designed to serve the existing and projected rural
5 population.

6 (C) Any development or redevelopment in terms of building size, scale, use,
7 or intensity shall be consistent with the character of the existing areas.
8 Development and redevelopment may include changes in use from vacant land
9 or a previously existing use so long as the new use conforms to the requirements
10 of this subsection (5);

11 The standards for a Type II LAMIRD are as follows:

12 (ii) The intensification of development on lots containing, or new development
13 of, small-scale recreational or tourist uses, including commercial facilities to
14 serve those recreational or tourist uses, that rely on a rural location and setting,
15 but that do not include new residential development. A small-scale recreation or
16 tourist use is not required to be principally designed to serve the existing and
17 projected rural population. Public services and public facilities shall be limited to
18 those necessary to serve the recreation or tourist use and shall be provided in a
19 manner that does not permit low-density sprawl;

20 The standards for a Type III LAMIRD are as follows:

21 (iii) The intensification of development on lots containing isolated nonresidential
22 uses or new development of isolated cottage industries and isolated small-scale
23 businesses that are not principally designed to serve the existing and projected
24 rural population and nonresidential uses, but do provide job opportunities for rural
25 residents. Rural counties may allow the expansion of small-scale businesses as
26 long as those small-scale businesses conform with the rural character of the area
as defined by the local government according to RCW 36.70A.030(15). Rural
counties may also allow new small-scale businesses to utilize a site previously
occupied by an existing business as long as the new small-scale business
conforms to the rural character of the area as defined by the local government
according to RCW 36.70A.030(15). Public services and public facilities shall be
limited to those necessary to serve the isolated nonresidential use and shall be
provided in a manner that does not permit low-density sprawl;

Under RCW 36.70A.070(5)(d)(v), an existing area or existing use is one that was in
existence on July 1, 1990. Finally, RCW 36.70A.070(5)(d)(iv) provides:

1 A county shall adopt measures to minimize and contain the existing areas or
2 uses of more intensive rural development, as appropriate, authorized under this
3 subsection. Lands included in such existing areas or uses shall not extend
4 beyond the logical outer boundary of the existing area or use, thereby allowing a
5 new pattern of low-density sprawl. Existing areas are those that are clearly
6 identifiable and contained and where there is a logical boundary delineated
7 predominately by the built environment, but that may also include undeveloped
8 lands if limited as provided in this subsection. The county shall establish the
9 logical outer boundary of an area of more intensive rural development. In
10 establishing the logical outer boundary, the county shall address (A) the need to
11 preserve the character of existing natural neighborhoods and communities, (B)
12 physical boundaries, such as bodies of water, streets and highways, and land
13 forms and contours, (C) the prevention of abnormally irregular boundaries, and
14 (D) the ability to provide public facilities and public services in a manner that
15 does not permit low-density sprawl.

16 In adopting Ordinance No. 2-2011, Yakima County designated the Buena Rural Settlement
17 LAMIRD.²³ The Board of Yakima County Commissioners made these specific findings
18 regarding the Buena Rural Settlement LAMIRD:

19 The Buena LAMIRD boundary is coterminous with the sewer and water service
20 area boundary for the County operated Buena Sewer and water system. The
21 public utility services were developed by Yakima County and largely funded by
22 the State of Washington Community Development Block Grant and other funds
23 to address petroleum and coliform-contaminated individual wells in this low
24 income neighborhood. The Buena Rural Settlement plan/zoning district and utility
25 service area follows a logical outer boundary for existing development. The two
26 parcels suggested for removal by Futurewise are within the service area and are
slated for service at the time of development. The Buena Rural Settlement
boundary was only modified to include a planned residential development now
owned and operated by the Diocese of Yakima.

Futurewise states in its brief that petitioners agree parts of the proposed Buena Rural
Settlement could qualify as a Type I LAMIRD; however, Futurewise argues the 1992 aerial
photograph provided by Yakima County shows large areas of Buena are in large lots that do

²³ Yakima County Ordinance 2-2011, Exhibit B, page 2 (March 16, 2011).

1 not qualify as a LAMIRD, particularly most of the area southwest of the Yakima Valley
2 Highway and West of Zillah.²⁴

3 In response, Yakima County asserts the Buena Rural Settlement is an existing area or
4 existing use that was in existence prior to July 1, 1990 with logical outer boundaries that are
5 coterminous with the Buena Community sewer and water service area boundary. On April
6 26, 2011, Yakima County submitted various items of pre-1990 correspondence and reports,
7 including an "Engineering Feasibility Study for Wastewater Treatment Facilities" dated April
8 28, 1987, "Community of Buena Sewer General Plan" dated May 1987, "Buena Community.
9 Abbreviated Water System Plan" dated May 1987, and a "Wastewater Facilities Plan for
10 Buena, Washington" dated July 1987.²⁵

11 In an April 17, 1987 letter, the Yakima Health District discussed the "environmental health
12 conditions and health risks as they relate to on-site sewage disposal at Buena." This letter
13 states: "Children and pets play in the ditches and pools that receive the sewage discharge
14 from failing on-site sewage systems. Hepatitis, Shigella, and forms of typhoid are potential
15 illnesses that can be spread via this method." These serious health issues were being
16 addressed in 1987 by replacing shallow wells with the new Buena water system and
17 community sewage collection and disposal.²⁶ The 1987 Buena Water System Plan states
18 that DSHS provided grant funds for the new Buena community water system constructed in
19 1985 and 1986.²⁷

20 The record contains uncontroverted evidence that in the 1980s, the low-income community
21 of Buena faced an imminent threat to public health and safety from severe contamination of
22 ground and surface water, and in 1987 the Yakima County Commissioners found that this

23 ²⁴ Wes Hazen, Upper Wenas Preservation Association, and Futurewise's Objections to a Finding of
24 Compliance, page 8 (March 29, 2011).

25 ²⁵ Yakima County's Supplemental Materials to Compliance Report, Exhibit A (April 26, 2011).

26 ²⁶ Letter from Environmental Health, director Charles L. George to Yakima County planner Rich faith, dated
27 April 17, 1987, attached to Yakima County's Supplemental Materials to Compliance Report, Exhibit C (April 26,
28 2011).

29 ²⁷ Yakima County Supplemental Materials, Exhibit A, page 10 (April 26, 2011).

1 constituted a serious public-health risk.²⁸ In response, local Yakima County officials
2 planned, funded, and constructed water and sewer infrastructure to markedly improve the
3 health of citizens in the community of Buena. These pre-1990 water and sewer system
4 facilities constitute part of the "built environment" as referenced in RCW
5 36.70A.070(5)(d)(iv).

6 There is substantial evidence in the record to support the findings by the Yakima County
7 Commissioners in Ordinance 2–2011 that the Buena Rural Settlement plan
8 designation/zoning and utility service area follows a logical outer boundary for existing
9 development and further that this was an existing area or existing use prior to July 1, 1990.
10 Petitioners have failed to satisfy their burden to prove that these actions by Yakima County
11 were clearly erroneous in view of the entire record before the Board and the goals and
12 requirements of the GMA.

13 V. ORDER

14 Based upon the foregoing, the Board finds: Yakima County has enacted legislation to
15 achieve compliance with the GMA as to Issue 10 and, therefore, the Board issues a **finding
of compliance** as to Issue 10: LAMIRD – Buena Rural Settlement.

16 Entered this 20th day of May, 2011.

17 _____
18 Joyce Mulliken, Board Member

19 _____
20 Raymond L. Paolella, Board Member

21 Concurrence of Board Member Nina Carter
22 _____
23 _____

24 ²⁸ Letter from Board of Yakima County Commissioners to Washington State Department of Community
25 Development dated April 28, 1987, attached to Yakima County's Supplemental Materials to Compliance
26 Report, Exhibit A (April 26, 2011).

1 I concur with the result reached by the majority under the particular facts and circumstances
2 presented by this Petition For Review. However, I write separately to note a discrepancy
3 between Yakima County's Comprehensive Plan mapping and designation criteria for
4 LAMIRDS and Yakima's land use maps for proposed LAMIRDS. The County's
5 Comprehensive Plan does not allow Type 1 LAMIRDs adjacent to a UGA. Specifically, the
6 Plan's mapping and designation criteria state that Type 1 LAMIRDS "are **not** adjacent to an
7 urban growth area (UGA) or another LAMIRD area, regardless of type."²⁹ Whereas, Yakima
8 County's proposed amendments to the Future Land Use Maps and Official Zoning Maps
9 show the Buena Rural Settlement directly adjacent to the City of Zillah's urban growth
10 area.³⁰ Since Petitioners did not fully develop their argument on page 9 of their Objections
11 to Findings of Compliance, this may impact future proposals for LAMIRDS adjacent to
12 UGAs.

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Nina Carter, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

²⁹ Yakima County Ordinance 2-2011, Exhibit A: Amendments to the Yakima County Comprehensive Plan and Chapter 15.37 of YCC Title 15, the Zoning Ordinance for Yakima County; Designation Criteria 1.c.; p. 2 .

³⁰ Yakima County Ordinance No. 2-2011, Exhibit B: Amendments to the Yakima County Comprehensive Plan – PLAN 2015 Future Land Use Map and YCC Title 15, the Zoning Ordinance for Yakima County, Official Zoning Maps; p. 2.